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November 6, 2013

VIA EMAIL (CharitiesComplianceDivisi.LPRA@cra-arc.gc.ca)
Compliance Division, Charities Directorate
Canada Revenue Agency
Ottawa ON, K1A 0L5

VIA REGULAR MAIL

National Informant Leads Centre
St. Catharines Tax Services Office
32 Church Street
Post Office Box 3038
St. Catharines ON L2R 3B9

Dear Sir or Madam:

**Re: Supplemental Letter Regarding Charitable Status of
Sierra Club of Canada Foundation
CRA Registration # 119149789RR0001**

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INTRODUCTION

We are instructed by EthicalOil.org.¹

This complaint, supplemental to the December 05, 2012, complaint and the September 19, 2013, complaint, is lodged on behalf of our client in respect of Sierra Club of Canada Foundation (“SCCF”), which is registered as a charitable organization with the Canada Revenue Agency (“CRA”). We bring to your attention the matters set out below and request that you determine whether SCCF is in contravention of the CRA rules, and the *Income Tax Act*, RSC 1985 c.1 (5th Supp.) (“ITA”).

The SCCF may be contravening CRA Rules and the ITA by:

- (a) acting as a conduit to provide funds to Sierra Club Canada;
- (b) not providing direction and control over funds provided to Sierra Club Canada; and/or,
- (c) engaging in political activity by funding Sierra Club Canada.

RELATIONSHIP BETWEEN SCCF AND SIERRA CLUB CANADA

Sierra Club Canada is a non-qualified donee that receives funds from SCCF. SCCF and Sierra Club Canada are nearly indistinguishable. Both have the same banner on their websites that reads, *Sierra Club Canada*, and both have the same logo. Additionally, they share the same contact information and web page to provide their contact information.² Clicking on the banner of SCCF’s website takes the browser to Sierra Club Canada’s website.

The stated mission of SCCF is:

The mission of the Sierra Club Canada Foundation is to advance the preservation and protection of the natural environment with charitable resources.³

The stated mission of Sierra Club Canada is:

Sierra Club Canada empowers people to protect, restore and enjoy a healthy and safe planet!⁴

The two groups have a very close relationship. The following is from the home page of SCCF:

While the Foundation is autonomous and governed by its own Board of Directors, it works closely with Sierra Club Canada in pursuing its program goals.⁵

¹ Legal name “Ethical Oil Institute”

² Sierra Club Canada Foundation, Contact, <http://www.sierraclub.ca/en/national/contact.shtml%20>

³ Sierra Club Canada Foundation, Home Page, <http://www.sierraclub.ca/en/foundation>

⁴ Sierra Club Canada, About Us, <http://www.sierraclub.ca/en/foundation>

Additionally, the SCCF and Sierra Club Canada share the same web page for their *About Us* section, and on the page it states:

Sierra Club Canada is the agent of Sierra Club of Canada Foundation, a registered charitable organization with the Canada Revenue Agency.⁶

THE LAW

POLITICAL ACTIVITY

Section 149.1(1) of the ITA provides that a charitable organization is required to devote all of its resources to charitable activities. Section 149.1(6.2) provides that a charitable organization may donate part of its resources to political activities, provided that the activities are ancillary and incidental to its charitable activities and do not include the support of, or opposition to, any political party or candidate. The application of the ITA is described by the CRA:

Under the Act and common law, an organization established for a political purpose cannot be a charity. The courts have determined political purposes to be those that seek to:

- further the interests of a particular political party; or support a political party or candidate for public office; or
- retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

The main reason why the courts rule out political purposes for charities is a result of the requirement that a purpose is only charitable if it generates a public benefit. A political purpose, such as seeking a ban on deer hunting, requires a charity to enter into a debate about whether such a ban is good, rather than providing or working towards an accepted public benefit.

It also means that in order to assess the public benefit of a political purpose, a court would have to take sides in a political debate. In Canada, political issues are for Parliament to decide, and the courts are reluctant to encroach on this sovereign authority (other than when a constitutional issue arises).

...

5. Unstated purposes and devoting more than the allowable maximum of a charity's total resources to political activities

⁵ Sierra Club Canada Foundation, Home Page, <http://www.sierraclub.ca/en/foundation>

⁶ Sierra Club Canada Foundation, About Us, <http://www.sierraclub.ca/en/foundation>

When a charity focuses substantially on one particular charitable activity so that it is no longer subordinate to one of its stated purposes, we may question the legitimacy of the activity at law. This is because when an activity is no longer subordinate to a charity's purposes, it may indicate that the charity is engaging in an activity outside its stated objects, or pursuing an unstated:

- collateral political purpose; or
- non-charitable purpose; or
- charitable purpose...

In such circumstances, rather than just considering the explicit purpose of the activity in question, we will consider all the facts and determine whether it is reasonable to conclude that the charity is focusing substantially on a particular activity for an unstated political purpose.

...

6. What kinds of activities can a charity participate in?

Although an organization established for a political purpose cannot be registered as a charity, a registered charity may take part in some political activities as a way of furthering its charitable purpose(s). However, charities do not have complete freedom to support any cause they like. Special legal rules apply to charities because of their charitable and tax statuses.

A charity wishing to carry out activities that go beyond the limits permitted by the Act may establish a separate and distinct organization that will not be a registered charity and therefore not able to issue charitable receipts. No limitations are placed on the political activities of such a body; it has complete freedom within the law to support any cause it chooses. But the charity cannot fund that separate organization or make resources available to it for any otherwise impermissible political activity.

For the purposes of this policy, a charity's activities can be divided into three separate types:

- 1.prohibited activities
- 2.political activities
- 3.charitable activities

6.1 What are prohibited activities?

A charity may not take part in an illegal activity or a partisan political activity. A partisan political activity is one that involves direct or indirect support of, or opposition to, any political party or candidate for public office.

When a political party or candidate for public office supports a policy that is also supported by a charity, the charity is not prevented from promoting this policy. However, a charity in this situation must not directly or indirectly support the political party or candidate for public office. This means that a charity may make the public aware of its position on an issue provided:

1. it does not explicitly connect its views to any political party or candidate for public office;
2. the issue is connected to its purposes;
3. its views are based on a well-reasoned position;
4. public awareness campaigns do not become the charity's primary activity.

...

6.2 What are political activities?

A charity may take part in political activities if they are non-partisan and connected and subordinate to the charity's purposes.

We presume an activity to be political if a charity:

1. explicitly communicates a call to political action (i.e., encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
2. explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or
3. explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

7. When is communication a charitable activity?

In carrying out their mandate, registered charities often have to communicate with the public or public officials. The following sections outline when such communication activities are charitable and when they are not.

7.1 Public awareness campaigns

A charity's public awareness campaigns aim to give useful knowledge to the public to enable them to make decisions about the work a charity does or an issue related to that work.

When a registered charity seeks to foster public awareness about its work or an issue related to that work, it is presumed to be taking part in a charitable activity as long as the activity is connected and subordinate to the charity's purpose. In addition, the activity should be based on a position that is well-reasoned, rather than information the charity knows or ought to know is false, inaccurate, or misleading. Finally, although the Canada Revenue Agency acknowledges that material produced in support of a public awareness campaign may have some emotional content, it would be unacceptable for a charity to undertake an activity using primarily emotive material.

To ensure that the activity is not considered a political activity, see the guidelines in section 6.2 above.

...

7.3 Communicating with an elected representative or public official

When a registered charity makes a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable. Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed, the activity is considered to fall within the general scope of charitable activities. [Footnote 7] However, such activity should be subordinate to the charity's purposes and all representations should:

- relate to an issue that is connected to the charity's purposes;
- be well-reasoned (or where time constraints make this impractical, should be based on a well-reasoned position and such a position should be submitted in a timely manner to the elected representative or public official concerned); and

- not contain information that the charity knows or ought to know is false, inaccurate, or misleading.⁷

DIRECTION AND CONTROL

Unlike funds given to a qualified donee, where a charitable organization is permitted to take a hands off approach and the funds are deemed to be charitable subject to certain exceptions, when a charitable organization gives funds to a non-qualified donee to provide a service, the charitable organization must exercise direction and control over those funds. In the case at hand, Sierra Club Canada is acting as the agent of SCCF to, allegedly, provide charitable activities on behalf of SCCF. Thus, SCCF must maintain direction and control over those funds. This is outlined by the CRA:

1.2. Direction and control when using intermediaries

The Canada Revenue Agency (CRA) requires that a charity take all necessary measures to direct and control the use of its resources when carrying out activities through an intermediary. When carrying out activities through an intermediary, the following steps are strongly recommended:

- Create a written agreement with the intermediary, and implement its terms.
- Communicate a clear, complete, and detailed description of the activity to the intermediary.
- Monitor and supervise the activity.
- Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis.
- Arrange for the intermediary to keep the charity's funds separate from its own, and to keep separate books and records.
- Make periodic transfers of resources, based on demonstrated performance.

A charity must maintain a record of steps taken to direct and control the use of its resources, as part of its books and records, to allow the CRA to verify that all of the charity's resources have been used for its own activities.

...

5. What is direction and control?

⁷ Canada Revenue Agency, "Policy Statement - Political Activities," <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>

A charity must direct and control the use of its resources ... when transferring them to an intermediary. The charity must be the body that makes decisions and sets parameters on significant issues related to the activity on an ongoing basis...

...

The CRA recommends adopting the following types of measures to direct and control the use of a charity's resources:

- Create a written agreement, and implement its terms and provisions.
- Communicate a clear, complete, and detailed description of the activity to the intermediary.
- Monitor and supervise the activity.
- Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis.
- Arrange for the intermediary to keep the charity's funds separate from its own, and to keep separate books and records.
- Make periodic transfers of resources, based on demonstrated performance.

A charity must record all steps taken to exercise direction and control as part of its books and records, to allow the CRA to verify that the charity's funds have been spent on its activities.

...

5.2. What is a written agreement?

A written agreement is a document that helps establish the relationship between a charity and its intermediary. The agreement should provide the authority and means for the charity to meet the own activities test, including by maintaining direction and control over its resources and over its intermediary's actions as they relate to the charity's activities.

...

5.3. What is a description of activities?

Before starting an activity, the charity and its intermediary should agree on a clear, complete, and detailed description of the activity. The charity should be able to document its exact nature, scope, and complexity.

...

5.4. What is monitoring and supervision?

Monitoring and supervision is the process of receiving timely and accurate reports, which allows a charity to make sure that its resources are being used for its own activities. Depending on factors such as the size, nature, and complexity of an activity, the reporting methods (as stated in any written agreement) can take many forms, including the following:

- progress reports
- receipts for expenses and financial statements
- informal communication via telephone or email
- photographs
- audit reports
- on-site inspections by the charity's staff members

5.5. What is ongoing instruction?

Ongoing instruction is the process of providing any necessary additional instructions or directions to an intermediary.

Records of any ongoing instructions help to show that the charity is carrying out its own charitable activities in accordance with the provisions of the Income Tax Act. Minutes of meetings or other written records of decisions are one way to show that a charity has given instructions. The CRA recommends using written instructions (for example - letters, emails, or faxes) to communicate with an intermediary whenever possible.

...

5.7. What are separate activities and funds?

When carrying on an activity through an intermediary, a charity has to make sure that it can distinguish its activities from those of the intermediary. ... A charity cannot simply pay the expenses an intermediary incurs to carry on the intermediary's own programs and activities. Doing so draws into question whether the activity is truly that of the charity.

In any situation where an intermediary is managing an ongoing activity on the charity's behalf, the money received from the charity should be kept in a separate bank account. It should be withdrawn only after receiving authorization

from the charity, or after the intermediary meets certain performance benchmarks. The charity's funds should also be reported in books and records separately from those of the intermediary.

If it is impossible to keep funds separate, then a charity must provide other evidence to distinguish its own resources and activities from the intermediary's, and to show the charity's direction and control over them.⁸

CONDUIT

The CRA defines a conduit as:

For the purposes of this guidance, a conduit is an organization that accepts donations for which it typically issues tax-deductible receipts and then funnels the money, without maintaining direction and control, to a non-qualified donee. Acting as a conduit violates the Income Tax Act and could jeopardize a charity's registered status.⁹

The CRA offers the following example of a conduit:

A charity is registered to protect the environment. A non-profit organization with identical purposes approaches the charity, and explains it has submitted an application for charitable status, but has not yet been registered.

The non-profit asks if the charity will accept donations on its behalf, issue receipts, and then forward the money to the non-profit. The charity agrees to the non-profit organization's request.

The charity has no direction or control over how the receipted funds are used, and no say in where, when or how the activity is carried out. In this case, the charity is simply funding the non-profit's own activities, and therefore, even though the activity itself may be charitable, the charity is acting as a conduit.

To avoid acting as a conduit, the charity must have real and demonstrable control over the use of its money, so that the carrying out of that activity by the intermediary amounts to the charity carrying on its own activity itself.¹⁰

⁸ Canada Revenue Agency, "Policy Statement - Using an Intermediary to Carry out a Charity's Activities within Canada", <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>

⁹ Canada Revenue Agency, "Policy Statement - Using an Intermediary to Carry out a Charity's Activities within Canada", <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>

¹⁰ *Ibid.*

THE COMPLAINT

SCCF and Sierra Club Canada have a very close relationship, and Sierra Club Canada acts as the agent of SCCF. Sierra Club Canada conducts activities that charitable organizations are not allowed to conduct. Thus, it may be that SCCF is:

- (a) conducting political activities by supplying funds to Sierra Club Canada to conduct the political activities;
- (b) acting as a conduit for Sierra Club Canada by accepting funds (so that tax deductible receipts can be issued) which are then provided to Sierra Club Canada and used for non-charitable purposes, that should be provided directly to Sierra Club Canada; and/or
- (c) failing to provide direction and control over funds provided to Sierra Club Canada – resulting in the funds being used for non-charitable purposes.

It is also possible that Sierra Club Canada carries on charitable activities on behalf of SCCF. However, it is submitted that the activities of Sierra Club Canada in this letter are not charitable.

Sierra Club Canada recently issued the below Media Release, entitled, *Welcome to Canada the Petro State - Harper Replaces Consultation with Storm Troopers*:¹¹



OTTAWA -- Sierra Club Canada is outraged by the military style attack on peaceful protesters yesterday in New Brunswick.

The use of police force to enforce the will of energy extraction companies is especially concerning since citizens were NEVER consulted (as is their constitutional right).

¹¹ Sierra Club Canada, Oct. 18, 2013, "Welcome to Canada the Petro State", <http://www.sierraclub.ca/en/petrostate>

"Sierra Club Canada stands in solidarity with the Mi'kmaq of Elsipogtog First Nation in their struggle. They have shown patience and courage in their month-long struggle for their constitutional rights. Like so much of their land, their right to consultation too has been stolen," said John Bennett, Executive Director of Sierra Club Canada.

There has never been a proper environmental assessment of large-scale fracking in New Brunswick -- despite widespread reports of contamination of wells in Canada and the United States.

The reality is that every fracking well uses millions of gallons of water mixed with hundreds of toxic and carcinogenic chemicals (that we know of—the rest are being kept secret).

"The federal government has replaced environmental assessment with storm troopers," said Mr. Bennett.

John Bennett, Executive Director
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Executive.Director@sierraclub.ca
613.291.6888
John on Twitter / Bennett Blog

In this Media Release, the Sierra Club of Canada is communicating to the public that the Government of Canada should change its decision regarding:

- (a) allowing fracking to occur in New Brunswick; and,
- (b) how it deals with people protesting against fracking in New Brunswick.

This Media Release of the Sierra Club of Canada is political activity. Additionally, included in the Media Release is a picture showing people in fatigues with assault rifles, labeled - *Canada's Economic Action Plan*. By associating *Canada's Economic Action Plan*, a phrase linked to the Conservative party of Canada, with armed men in fatigues, Sierra Club of Canada is expressing opposition to the Conservative Party of Canada, and that is prohibited activity.

John Bennett ("**Bennett**") Executive Director of Sierra Club Canada, followed up the above Media Release with the following blog posted on the Sierra Club Canada website:

Mi'kmaq of Elsipogtog First Nation deserve more than a dawn police raid

Submitted by John Bennett on Wed, 2013-10-23 15:51

Last Thursday, the RCMP launched a military style raid on a peaceful, though illegal, blockade of a compound containing "thumper" seismic testing trucks

(used to search for the presence oil/natural gas below the surface). These thumper trucks have been operating on the territory of the Mi'kmaq of Elsipogtog First Nation in search of fracking opportunities.

The Mi'kmaq have objected to the presence of SWN—a Houston, Texas-based energy company—due to absence of consultation. This goes back several months when they first began protests against SWN trespassing on their territory.

On Friday, Sierra Club Canada issued a short press release containing a graphic linking the police action to the federal government's "Economic Action Plan".

After listening to the Governor General's Speech from the Throne outlining the government's plans for an aggressive natural resource agenda, we concluded the timing may not have been coincidental. Further, the fact that it happened at the conclusion of United Nations Special Rapporteur James Anaya's visit to Canada was more evidence: Harper's way of giving the middle finger to the U.N and First Nations across Canada. When recently in New York, the Prime Minister's stage-managed comment that he would "not take no for an answer" to the Keystone XL pipeline wasn't just aimed at Barack Obama, but at Canada's First Nations also.

We felt (and still feel today) that the assault on Elsipogtog was the opening salvo in a war on the Mi'kmaq and other First Nations who would hold up energy/resource extraction in Canada.

Getting back to our press release...we apparently hit some nerves because over the weekend we had an unprecedented number of downloads (over 5000) and significant (positive) re-tweeting. We also received attention from an obscure Sun Media propagandist—further vindication we were on the right side of the story.

What concerned me, however, were emails from a media outlet and a former staffer. They suggested the release undermined our credibility and was a form of tabloidism and "sensationalizing" of the story. I strongly beg to differ.

Our mission as stated on our website is: "Sierra Club Canada empowers people to protect, restore and enjoy a healthy and safe planet!" With this mission and our long history how could we not stand in solidarity with Mi'kmaq of Elsipogtog? Our release and graphic were emotional, evocative and perhaps terse (in that it did not fully explain our position) while making a very big statement. So I'd like to explain more fully and demonstrate that the emotion was honest and based on cumulative experience—not a knee jerk reaction or gambit to seek publicity.

Is it a reach to be concerned there will be many more "police actions" to enforce the "economic action plan"? The 2012 budget omnibus bills largely took away

First Nations' and the public's right to participate in resource development decisions. Doesn't this means going forward there will more and more confrontations as impacted people realize they have very limited legal options-- and turn to protests like the blockade by the Elsipogtog First Nation? Are dawn raids by pepper spraying swat teams with viscous dogs what's in store for us all?

The Elsipogtog First Nation has never ceded its territory and has had its rights reaffirmed by the Supreme Court, but their attempt to invoke those rights (when it came to an oil company searching for natural gas on their territory) was ignored by the federal and provincial governments, by the judge who granted the injunction enforced by the RCMP, and by the national media (I just learned the injunction has been overturned by the courts).

As for tabloidism, it simply isn't true. I tried in June, July and again in September to draw the national mainstream media's attention to the escalating situation happening in New Brunswick, and the controversial practice of fracking (a process that contaminates millions of gallons of water for each and every well drilled).

Even when I pointed out the protest was led by the chief (and not a small group of 'activists'), no one was interested in covering the story. NO ONE.

Why is a First Nation attempting to enforce its constitutional rights not a story until there is violence?

Not until the police raid did the story get out of New Brunswick and then all we all heard "Forty arrested in violent protest." This was a gross distortion.

A peaceful protest had been held for weeks without ANY incident. Not until the swat raid was there any violence. Shouldn't the headline have been: "Police raid on peaceful protest results in violence"?

Most Canadians aren't aware that the night before the violent confrontation the RCMP visited the peaceful protest camp with tobacco (a symbolic offering) implying goodwill. In hindsight, that action can only be seen as an attempt (successful) to lull the Mi'kmaq into a fall sense of peace and security; into a sense of complacency. It's no wonder the Mi'kmaq don't trust the government and RCMP.

It was the mainstream media that chose to ignore a long-standing First Nation action undertaken to enforce its constitutional rights and react with tabloid sensationalism, focusing on pictures of cop cars burning. That's why we used the graphic--we felt it was a more accurate representation than was being reported.

I have participated in many protests over the years and my experience is when the police treat people with respect -- people treat the police with respect. Sierra

Club Canada STRONGLY believes in, and supports, the rule of law but it is our role to point out when the law is not just, not properly enforced or simply ignored.

The case of the Mi'kmaq of Elsipogtog First Nation raises many questions about the nature of our society. It deserves more than a dawn SWAT raid with pepper spray, snipers and police dogs.

John Bennett, Executive Director
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412-1 Nicholas Street
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Executive.Director@sierraclub.ca
John on Twitter / Bennett Blog¹²

In the blog, Bennett is explicitly communicating to the public that the government (presumably the Federal government), should change its decision on how to react to the blockade by the Mi'kmaq of Elsipogtog First Nation. This is political activity.

CONCLUSION

SCCF is a registered charity with a stated mission “to advance the preservation and protection of the natural environment with charitable resources.”¹³

SCCF funds Sierra Club Canada to, ostensibly, meet its mission:

While the Foundation is autonomous and governed by its own Board of Directors, it works closely with Sierra Club Canada in pursuing its program goals.¹⁴

Sierra Club Canada is the agent of Sierra Club Canada Foundation, a registered charitable organization with the Canada Revenue Agency.¹⁵

The Media Release and Blog discussed above, are additional examples of political and prohibited activity of Sierra Club Canada.

¹² John Bennett, Oct. 23, 2013, “Mi'kmaq of Elsipogtog First Nation deserve more than a dawn police raid”, <http://www.sierraclub.ca/en/ElsipogtogBlog>

¹³ SCCF, “About Us”, <http://www.sierraclub.ca/en/foundation>

¹⁴ SCCF, “Home Page”, <http://www.sierraclub.ca/en/foundation>

¹⁵ SCCF, “About Us”, <http://www.sierraclub.ca/en/foundation>

Please consider the information in this letter in conjunction with our previous letters.

Yours truly,

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

A handwritten signature in black ink, appearing to read 'Darren J. Reed', with a large, stylized flourish at the end.

DARREN J. REED

cc: *SCC Foundation (via email: sccfoundation@sierraclub.ca)*
Attn: Paul Senez, President